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No. \_\_\_\_\_

# In the Supreme Court of the United States

OCTOBER TERM, 198\_\_\_\_\_

CATHERINE H. MOORE,  
*Petitioner,*

v.

HARRY A. MOORE,  
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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August, 1983

## **QUESTIONS PRESENTED**

The questions presented relate wholly to the jurisdiction of the District Court of Payne County, State of Oklahoma to render a default judgment and enter a decree of divorce against Petitioner. She contends her rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and her rights under the Constitution of the State of Oklahoma, Article II, Section 7, together with the Oklahoma Statutes cited below, were violated in that she has been denied due process of law in proceedings which deprived her of her marriage and marital rights. Specifically it is her contention that:

(1) No action was commenced by the husband by his filing of a Petition for Divorce in the state district court because no summons was issued by the court clerk thereof, a statutory prerequisite to commencing an action in the state of Oklahoma, and

(2) No action was pending against her upon which the decree of divorce could be based, therefore the said decree is null and void. 12 Okla. Stat.(1971), Section 151, and

(3) Alternatively, if an action be deemed to have been commenced and Petitioner is deemed subject to the jurisdiction of the state court despite no summons having been issued by the court clerk, she nevertheless had no duty to answer the Petition for Divorce filed by the husband because she was under no judicial mandate to answer at or before the date the default judgment was entered on October 9, 1974, in which case finding her in default was an improper exercise of judicial power and a denial of due process of law. Fourteenth Amendment to the Constitution of the United States.

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No. ....

In the  
Supreme Court of the United States

OCTOBER TERM, 19.....

CATHERINE H. MOORE,  
*Petitioner,*

v.

HARRY A. MOORE,  
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF OKLAHOMA**

---

**OPINIONS AND ORDERS BELOW**

The Oklahoma Supreme Court declined on May 9, 1983, to consider Petitioner's petition for reconsideration of that court's order of April 18, 1983, denying certiorari from the Oklahoma Court of Appeals, Division 3. The latter court denied Petitioner's petition for rehearing on March 8, 1983, to its decision of February 8, 1983, which decision affirmed the District Court of Payne County, State of Oklahoma decision of July 21, 1980, which had denied Petitioner's Motion to Vacate Default Judgment of a Decree of Divorce rendered against her default on October 9, 1974. The decisions are unreported and are set out in the Appendices hereto.

On the 15th day of July, 1983, Byron R. White, Associate Justice of the Supreme Court of the United States, granted Petitioner until the 18th day of August, 1983, for filing a petition for writ of certiorari in this Court.

## **JURISDICTION**

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

### **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**

I. Fourteenth Amendment to the Constitution of the United States, Section 1:

"[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

II. Constitution of the State of Oklahoma, Article II, Section 7:

"No person shall be deprived of life, liberty, or property, without due process of law."

III. 12 Oklahoma Statutes (1971) Sections 151, 153, 53 and 283:

"§ 151. *Petition and summons—Service by Publication—Service by Mail*

A civil action is deemed commenced by filing in the office of the court clerk a petition and by the clerk's issuance of summons thereon. Where service by publication is proper, the action shall be deemed commenced at the date notice of publication is signed by the court clerk. Where service is sought to be effected by mailing, the action shall be deemed commenced when the envelope containing summons addressed to the defendant or to the service agent, if one be appointed, is deposited in the United States mail with postage prepaid for forwarding by certified mail with a request for a return receipt from addressee only."

The summons shall be prepared by the plaintiff, petitioner, cross-petitioner, intervenor, or any person seeking affirmative relief, and issued by the clerk; shall be under the seal of the court from which the same shall issue; shall be signed by the clerk; and shall be dated the day it is issued. The summons must be directed to the defendant and inform said defendant that he has been sued in said action and must answer the petition on or before a date stated therein. A copy of the petition shall be attached to the summons and served on the defendant with the summons. If the defendant fails to appear, judgment shall not be rendered for a larger amount or for other relief than is requested in the petition with costs. The summons and its return shall be substantially in the following form:

## SUMMONS

IN THE DISTRICT COURT IN \_\_\_\_\_ COUNTY,  
STATE OF OKLAHOMA, (address) OKLAHOMA

plaintiff )  
vs ) No. ....  
defendant )

THE STATE OF OKLAHOMA

**To the above named defendant(s):**

You have been sued by the above-named plaintiff(s), and you are directed to file a written answer to the attached petition in court at the above address on or before \_\_\_\_\_, 19 \_\_\_\_\_.

A copy of your answer must be delivered or mailed to the plaintiff or his attorney, and proof of service must be filed in the above court with your answer.



Unless you answer the petition within the time stated judgment will be rendered against you with costs of the action.

Witness my hand and the seal of this court, affixed on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_\_.

\_\_\_\_\_, Court Clerk

by \_\_\_\_\_, Deputy Court Clerk

(SEAL)

YOU MAY SEEK THE ADVICE OF AN ATTORNEY ON ANY MATTER CONNECTED WITH THIS SUIT OR YOUR ANSWER. SUCH ATTORNEY SHOULD BE CONSULTED IMMEDIATELY SO THAT AN ANSWER MAY BE FILED WITHIN THE TIME LIMIT STATED IN THE SUMMONS."

Thereafter appears the portion relating to the return of service. It is omitted in this printing.

"§ 283. *Time of filing pleadings*

The answer or demurrer, by the defendant, shall be filed within twenty days after the day on which the summons is returnable; the reply or demurrer shall be filed within thirty days after the day on which the summons was made returnable; the demurrer to the reply shall be filed within forty days after the day on which the summons was made returnable."

"§ 53. *Sheriff to indorse time of receipt of summons*

The sheriff shall indorse upon every summons, order of arrest, or for the delivery of property or of attachment or injunction, the day and hour it was received by him."

### **STATEMENT OF THE CASE**

The parties were residents of Cushing, Payne County, Oklahoma. As of July 9, 1974, when the husband filed a Petition for Divorce in the District Court of Payne County, they had been married approximately 29 years and had four living children, two of whom were of legal age.

Petitioner was named as defendant in the Petition for Divorce. No summons was issued by the court clerk at the time the said petition was filed, or thereafter. No other form of process was forthcoming from either the clerk or a judge of the District Court. On July 10, 1974, at the instigation of the husband, a document prepared by his attorney entitled "Entry of Appearance and Reservation of Time to Plead" stating "Comes now the Defendant, Catherine H. Moore, and acknowledges receipt of a certified copy of the petition of the Plaintiff filed herein, enters her general appearance in this cause, and reserves a period of thirty (30) days from July 10, 1974, in which to plead or answer in this cause.", was signed by her and filed in the office of the court clerk. She made no further pleadings. Petitioner was never represented by counsel. On September 30, 1974, the husband's counsel filed a "Motion for Default Judgment." The trial judge set hearing on the motion for October 9, 1974. Petitioner was mailed and received a copy of the notice setting the said hearing. She went to the location of the hearing where she was misled by the husband who told her other cases would be heard before theirs because of the long docket that day. She went home. The hearing was immediately held and a default judgment was entered which granted his Petition for Divorce. Within the time provided by statute she petitioned

the state district court to vacate the default judgment and set aside the decree of divorce.

On June 30, 1980, after discovering from the case docket sheet that no summons had been issued by the court clerk, an amendment was made to the said Motion to Vacate Judgment, to-wit:

"[P]etitioner requests that the Decree of Divorce heretofore entered on the 9th day of October, 1974, in Case No. JFD-74-228 be vacated, set aside and held for naught for the reason said Decree is void in that Summons was not issued by the Clerk of the District Court in said cause and this Petitioner never legally nor effectively waived the issuance of a Summons therein."

On July 21, 1980, after a trial on the merits of the said Motion, the state district court judge denied it in its entirety, and concluded as a matter of law that "[D]efendant waived any objection to service by executing her entry of appearance and that she had actual notice of the trial date by receipt of a motion for default judgment." See page 3 of the court's "Conclusions of Law" in Appendix A hereto.

On August 19, 1980, Petitioner filed a Petition in Error in the Oklahoma Supreme Court, which, *inter alia*, contained the following:

"F. The precise points of law urged as error are:

1. The entry of the default judgment against Appellant in the divorce proceeding constituted a denial of due process of law as to Appellant.
2. The divorce proceeding was not commenced in accordance with the law of the State of Oklahoma and the default judgment is a nullity."

On November 25, 1981, Petitioner filed an "Amendment to Petition in Error" in the Oklahoma Supreme Court, which, *inter alia*, insofar as showing the method and manner of raising the federal question in that court and now pursued, was as follows:

"COMES NOW the Appellant, and pursuant to Rule 1.17 amends her Petition in Error in the following particulars, to-wit:

By deleting therefrom grammatical Paragraphs F. and G. and substituting therefor the following:

F. The precise points of law urged as error are:

(1) The Trial Court was without jurisdiction to render a Decree of Divorce because no action was commenced pursuant to 12 O.S. (1971) §151, and further

"Without the issuance of summons or other process wherein the defendant is directed to answer a defendant has no duty to answer and the rendering of a default judgment against her is premature and a denial of due process in violation of the Constitutions of the United States and the State of Oklahoma.

(2) The Trial Court erred and abused its discretion when it concluded as a matter of law that the defendant waived any objection to service by executing her Entry of Appearance and that she had actual notice of the trial date by receipt of a Motion for Default Judgment because the probative proof in the record fails to support the conclusion."

Her appeal was assigned to the Court of Appeals, Division 3. That court affirmed the trial court. She filed a Writ of Certiorari to the Oklahoma Supreme Court. The Writ was denied, as was her petition for reconsideration.

On page 3 of the Court of Appeals, Division 3 Opinion, the following is said:

"Catherine's (Petitioner) voluntary general appearance in the divorce action was equivalent to service of process. 12 O.S. (1981) §162; *Wagoner v. Saunier*, 627 P.2d 428 (1981). Moreover, her appearance, made without challenge to the court's jurisdiction, constituted a waiver of jurisdictional defects. *Russell v. McGinn*, 514 P.2d 658 (1973); *Gray v. Gray*, 459 P.2d 181 (1969). No reversible error resulted from Harry's failure to direct the issuance of a summons."<sup>1</sup>

After the Court of Appeals, Division 3, had denied her Petition for Rehearing, Petitioner filed a Petition for Certiorari in the Oklahoma Supreme Court. She renewed therein, i.e., pages 1 and 2, the requests earlier made in regard to the federal question here pursued, when she said as follows:

"[T]he reason Catherine asks this court to grant certiorari is because she believes she has been denied due process which is guaranteed her by the Constitutions of Oklahoma and the United States. She believes that in not causing a summons to be issued when the petition was filed, nor later obtaining a show cause order (process) compelling her answer, Harry could not rely on her 'Entry of Appearance' to place jurisdiction on the trial court because she was of unsound mind at the time she signed it. She also believes that the due process and jurisdictional question she raises is one of first impression in this court, and she respectfully asks that this court decide that vital

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<sup>1</sup> In *Wagoner* and *Gray*, supra, a summons was issued to commence the action. In *Russell*, supra, *Gray*, supra, was relied on to support the decision there. It is to be noted the record is silent in regard to the issuance of a summons.

part of her appeal by granting certiorari because future cases and future defendants, as well as she, will be affected by the decision on the question raised."<sup>2</sup>

"Section 2.

(a) There are other facets to the jurisdictional objection mentioned above which are not matters of first impression, but which also serve as reason for Catherine contending she was deprived due process of law. Firstly, the document relied on by the courts below does not show on its face that it was intended to be a waiver of the issuance of summons. Secondly, her treating physician's uncontested and unimpeached testimony was that she was suffering from delirium tremens on July 10, 1974, the day she signed it, which as is noted is a form of insanity. It is Hornbook law that an insane person, temporarily so, or otherwise, cannot execute such a document, and have it be valid,

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<sup>2</sup> Sixteen states have statutes similar to Oklahoma which statutorily require that the commencement of an action is by the filing of a petition or complaint and the court clerk immediately issuing a summons thereon. Twenty other states follow the Federal Rules of Civil Procedure in regard to commencing an action. It is suggested therefore that the issues raised here have impact on a significant number of the states and are not issues relating simply to these parties, or to Oklahoma only. The states having commencement of action statutes similar to Oklahoma are:

Arkansas	Kentucky	Mississippi	Ohio
Delaware	Maryland	Missouri	Pennsylvania
Florida	Massachusetts	Nebraska	Virginia
Iowa	Michigan	North Carolina	Wisconsin

The states following the Federal Rules of Civil Procedure are:

Arizona	Indiana	North Dakota	Utah
Colorado	Kansas	New Mexico	Vermont
Georgia	Minnesota	Rhode Island	Washington
Hawaii	Montana	Tennessee	West Virginia
Idaho	Nevada	Texas	Wyoming

if attacked. Lastly, the courts below failed to consider that she was never issued process requiring that she answer the Petition for Divorce by a certain date otherwise a default would be entered against her. Without process she was under no duty to answer, and a default entered against her on the judgment roll is void as an improper exercise of judicial power. She asks this court to grant certiorari, review the record, and it will so hold."

The Supreme Court of Oklahoma denied her Petition for Certiorari and also her petition for reconsideration on the dates indicated above and left in force and effect the Decree of Divorce. Petitioner believes the courts of Oklahoma were properly advised by her of federal questions being present in her appeal and those courts failed to properly decide the federal questions raised.

### **REASONS FOR GRANTING THE WRIT**

Petitioner believes the Court of Appeals, Division 3, State of Oklahoma, decided an important question of federal law in a way in conflict with the applicable decisions of this Court. The Oklahoma Supreme Court likewise erred in denying her Petition for Certiorari. She suggests it appropriate that this Court settle the issue of whether an action may be commenced by procedures other than that proscribed by the sovereign because 16 states have statutes similar to Oklahoma on this important issue. Moreover, Rules 3 and 4 of the Rules of Civil Procedure have striking similarity of purpose, and 20 states generally follow those rules insofar as commencing an action is concerned.

It is too well established to be seriously argued the sovereign, through appropriate procedure, establishes its



courts and the means whereby the rights of its citizens and their property are to be affected by those courts. The term most commonly applied to the right of a court to take action on behalf of, or against a person is its "jurisdiction." Mr. Justice Miller in *Cooper v. Reynolds, Lessee*, 77 U.S. 931, 10 Wall 308, 19 L.Ed. —, decided in 1870, succinctly outlined that right of the sovereign and the definition of the term when he said:

"[I]t is as easy to give a general and comprehensive definition of the word 'jurisdiction' as it is difficult to determine, in special cases, the precise conditions on which the right to exercise it depends. This right has reference to the power of the court over the parties, over the subject-matter, over the res or property in contest, and to the authority of the court to render the judgment or decree which it assumes to make.

By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred.

Jurisdiction of the person is obtained by the service of process or by the voluntary appearance of the party in the progress of the cause."

In a much later case Mr. Justice Cordozo in *Chisholm v. Gilmer*, 299 U.S. 99, 57 S.Ct. 65, enlarged upon the recognized right of the sovereign when it was said, "[H]ow a suit shall be begun, whether by writ or by informal notice is a question of the practice of the state or of its forms and modes of proceedings. *Amy v. Watertown*, No. 1, 130 U.S. 301, 304, 9 S.Ct. 530, 32 L.Ed. 946."



The Oklahoma Legislature has set forth the procedure for Commencement of Action, 12 O.S.(1971) Chapter 6, §151, *supra*. Moreover, in Chapter 3 of 12 O.S.(1971) the subject of Limitations of Actions is covered and §97, relates to the latter subject. (The purpose for mentioning Chapter 3 will be apparent momentarily when *Rorick v. Devon Syndicate, Limited*, 307 U.S. 299, 59 S.Ct. 877, ----- L.Ed. -----, is discussed.)

Petitioner believes *Rorick*, *supra*, supports one of the contentions she makes here and which she also made to the three Oklahoma courts in which she has appeared before arriving here. She believes this Court has long recognized and accepted the rule of law that an urgency exists for exactly following the statutory proscription for the commencement of an action, otherwise the future action of the court is null and void. The second contention she makes is that until some form of process requires her to answer she is under no duty to do so. Moreover, without process there can be no default.

In *Rorick*, *supra*, this Court was considering an alleged lack of jurisdiction of the state court. Speaking through Mr. Justice Douglas and being called upon to interpret statutes of Ohio almost identical to those of Oklahoma, the Court said:

"[T]he Seibert case and the Bacher case thus seem to be wholly consistent. An order of attachment issued prior to the filing of a petition and issuance of summons is void; an order of attachment issued after filing of the petition and the issuance of summons but prior to the commencement of service by publication is valid, though personal service is not had."

The *Seibert* case and the *Bacher* case referred to by Mr. Justice Douglas were both Ohio cases. In the former an order of attachment was issued upon the filing of the petition and before summons was issued. The order of attachment was declared unauthorized and void because no action had been commenced. In the latter case the petition was filed and summons was issued, but unserved, and publication notice was thereafter made. The order of attachment however was issued in the interim between the commencement of the action and the date of publication. The court held the order of attachment valid saying the action was commenced before its issuance. It then went on to indicate the statute relied on by the defendant did not relate to commencing of the action but rather to limitations of actions, and thus was inapplicable to the situation at hand.

It is to be noted that Section 151, *supra*, of the 12 Oklahoma Statutes, is within Chapter 6, Commencement of Action; it is not within Chapter 3, Limitation of Actions of Title 12. The point of the notation is to amplify the distinction drawn by Mr. Justice Douglas in the *Bacher* case.

There are a number of Oklahoma decisions which support the Petitioner's position here, and were cited by her to the Oklahoma courts. *Kelly-Goodfellow Shoe Co. v. Todd*, 49 P. 53; *Montgomery v. Hogan, et al.*, 185 P. 81; *Crowley-Lanter Lbr. Co. v. Dow*, 150 Okla. 150; *Owens, et al. v. Clark*, 6 P.2d 755; *Fitzsimmons, et al. v. Rauch*, 172 P.2d 633; *Hicks v. Hamilton*, 283 P.2d 1115; *Horath v. Pierce*, 506 P.2d 548.

She can only speculate upon the reasoning used by the three Judges of the Court of Appeals, Division 3, when that court failed to follow the above-cited Oklahoma cases or the clear language of the statutes. She thinks, however, that court most likely had a misconceived notion of what is "the law of the land" in regard to commencing an action. That is to say that court failed to recognize the mandatory effect of a plaintiff properly commencing an action, otherwise future action of the court is void, because it concluded the import of the line of cases it reviewed seemed to say a voluntary appearance is not only the equivalent of service of process, it serves to replace the need for process. Put yet more differently, that court seemed to be of the opinion a voluntary appearance of a person named a defendant in a petition cured any jurisdictional defect brought about by an improper commencement of the action. Indeed, it stated, "[h]er appearance, made without challenge to the court's jurisdiction, constituted a waiver of jurisdictional defects." Petitioner submits it is impossible to waive and/or cure a jurisdictional defect of the magnitude of a failure to commence an action. She respectfully reminds the Court of its decision in *Rorick*, *supra*; however, she will briefly explain below her rationale for differing with the opinion of the Court of Appeals.

A casual reading of the various Digests for this Court and others, both state and federal, would tend to be persuasive that if one voluntarily appears in an action he necessarily submits to the jurisdiction of the court for all purposes. As Digest law the statement is not necessarily incorrect; however, because Digests are restricted by space limitations, the statement falls short of stating the entire

background of the cases used to support it. The fact of the matter is, such comments in those Digests, and the comment about to be made is particularly true insofar as the *Supreme Court Digest*, 2 S.Ct.D. 797, Appearance, §20—Waiver is concerned, refer the reader to cases wherein at the outset the action was either properly commenced in accordance with either the state statute or the Rules of Civil Procedure, or later the party appearing was ordered to appear by the Judge of the particular court to perform a specific act—and in either instance the party made a voluntary appearance after the issuance of the summons or after the order was made. *Creighton v. Kerr*, \_\_\_\_ U.S. \_\_\_\_, 22 L.Ed. 309; *Gracie v. Palmer*, 21 U.S. 699, 8 Wheat \_\_\_\_; *Pollard v. Dwight*, 8 U.S. 421, 4 Cranch \_\_\_\_; *Shelton v. Tiffin*, 47 U.S. 163, 47 S.Ct. 387, 6 How 163; *Henderson v. Carbondale Coke*, 140 U.S. 25, 11 S.Ct. 691. It may be said therefore this Court has not clearly established that a voluntary appearance in a proceeding has the force and effect given it by the Oklahoma courts referred to herein. If this Court has been called upon to rule on that precise issue the decision of the Court has escaped this writer's somewhat extensive research on the subject.

Petitioner does not wish to be repetitious for she has noted summons was not issued, and also that she was not ordered to answer the Petition for Divorce. But she has not yet emphasized that 12 O.S. §283, supra, is the exclusive statute in Oklahoma on the due date of an answer to a petition. It provides that the answer date is to be controlled by the returnable date of the summons. Assuming arguendo, she was properly before the court by reason of her "Entry of Appearance", having not been ordered to

answer and no summons in existence, the question seems to logically flow, what could be the basis for the court finding that she was in default when she was under no court directed process or order to do so? To pose the rhetorical question is to answer it also, she was in default of no process of the court. Rather the court presumed to exercise its judicial power, and she submits the power was abused as to her, in finding her in default when actually she was not. Assuming, again arguendo, she was properly before the court is it not to be said — and she submits this is the law as laid down by this Court — before the state court could find her in default under these facts and enter default judgment against her, due process would dictate that it (the trial court) first order her to answer with notice that failure to do so within a reasonable period of time would be cause for it finding her in default?

She believes the latter mentioned order may have cured the procedural defect of the non-issuance of summons, however, without it, she was deprived of the "due process of law" to which she was entitled under the Fourteenth Amendment of the Constitution of the United States. In all events the action taken by the state district court was an improper exercise of judicial power under these circumstances and the default judgment it rendered is void.

### CONCLUSION

This Court should review this case because this Petitioner was denied due process of law on matters most vital to her, i.e., her marriage and her marital rights. No institution in the society of this Nation is more necessary for its survival. Moreover, the matter of whether an action can be commenced despite a failure on the plaintiff/petitioner's part to follow the sovereign's statutory directive in regard thereto should be settled by this Court. Additionally, this Court should settle the issue of whether due process is attained if a default judgment is rendered despite no issuance of process which requires that an answer be filed on a date on or before the date of the finding of the default occurring. Each of the issues is one of great importance to the Petitioner, to Oklahoma and to the 16 States who join Oklahoma in requiring that to commence an action it is necessary that there be both the filing of the petition and the issuance of a summons. It is also an important issue to the 20 states who follow Rules 3 and 4 of the Federal Rules of Civil Procedure.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

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August, 1983

## APPENDICES

## APPENDIX A

[Filed July 22, 1980]

IN THE DISTRICT COURT OF PAYNE COUNTY,  
STATE OF OKLAHOMA

HARRY A. MOORE,	)	
Plaintiff,	)	
vs.	)	No. JFD-74-228
	)	
CATHERINE H. MOORE,	)	
Defendant.	)	

### FINDINGS OF FACT

That the parties herein were married in October of 1954. That the Defendant worked during the early years of the marriage while the Plaintiff was in military service, and attending college. In 1954, the parties moved to Cushing, Oklahoma, where the Plaintiff entered the oil business as a partner of Massey-Moore. Subsequently the Defendant remained a housewife and cared for the children of the parties.

That the partnership of Massey-Moore acquired and operated oil and gas properties and equipment and over a period of years became of considerable value. That in 1973, the partners were approached in regard to a sale of their interests in Massey-Moore. That through a series of transactions, a transfer was consummated whereby W. R. Grace and Company acquired the holdings of Massey-Moore in exchange for W. R. Grace stock. The Plaintiff received 187,200 shares of "lettered" stock in exchange for his interest in Massey-Moore. As of the date of September 27, 1974, the stock had a market value of approximately \$24.00 per share, and was paying a \$1.50 per share annual dividend. The "lettered" stock received by the Plaintiff carried certain restrictions as to transfer, but more importantly, because of the tax basis in the stock, the actual value to



## [APPENDIX]

the plaintiff was approximately \$13.50 per share for a total value at that time of approximately \$2.5 Million, and that that figure constituted the majority of the marital estate.

The Defendant, over a period of years, developed a drinking problem which reached such proportions as to require professional help. At the insistence of the Plaintiff and other family members, the Defendant received treatment during the years 1973 and 1974. That at one point the Plaintiff demanded that the Defendant stop drinking or he would institute divorce proceedings. The Defendant continued to drink and the Plaintiff filed for divorce on July 9, 1974. The Defendant at that time was receiving treatment for her alcohol problem in St. Anthony's Hospital in Oklahoma City, having been admitted on July 8, 1974. On July 10, 1974, the Defendant executed an entry of appearance, Pro Se, on a form prepared by the Plaintiff's attorney. The Defendant was never served by summons and was subsequently released from St. Anthony's on July 13, 1974.

Pursuant to a telephone conversation between the Defendant and the attorney for the Plaintiff, the Defendant and her brother met with the Plaintiff's attorney at an Oklahoma City hotel to discuss property settlement. On September 27, 1974, the Defendant, after counseling with her brother and adult son, executed an agreement for property settlement and alimony submitted by the Plaintiff's attorney as evidenced by Respondent's Exhibit No. 1 introduced herein.

That on October 9, 1974, after having been served with Plaintiff's Motion for Default Judgment more than five days prior thereto, the Defendant went to the City Hall, Cushing, Oklahoma, where she was told by the Plaintiff that there were a number of cases preceding her case, at which time she returned to her home. The Plaintiff's attorney, after having been instructed by the Court, drove to the Defendant's home, inquired if the Defendant wanted to

offer any evidence and was advised by the Defendant that she did not. That upon advising the Court of this, the property settlement was approved and the divorce granted.

### CONCLUSIONS OF LAW

1. The Court concludes as a matter of law that the Defendant waived any objection to service by executing her entry of appearance and that she had actual notice of the trial date by receipt of a motion for default judgment and as evidenced by the fact that she appeared at City Hall in Cushing on the trial date.

2. The Court concludes as a matter of law that the Defendant was not a person of unsound mind as defined by the laws of this state either at the time of executing the Entry of Appearance, Property Settlement Agreement, or on the date the divorce was granted. It is difficult to imagine that one could be so incapacitated as to not understand the force and effect of an entry of appearance and yet be released from hospital care three days later to continue to conduct and transact her own affairs.

3. Finally, the Court concludes as a matter of law that there was no fraud practiced by the Plaintiff in the procurement of the property settlement and divorce.

(a) The Court has earlier concluded that the Defendant was, at the time of executing the property settlement agreement, capable of managing her own affairs.

(b) That in retrospect, it may appear that the Plaintiff received more than the Defendant by way of the property settlement, but because of the fluctuating nature of stocks, the only true measure of value would be its actual value at the time the agreement was negotiated. Neither the stock price nor the dividend are assured of remaining the same. At the time of the execution of the property settlement, the alimony the Defendant received, plus the

**(APPENDIX)**

home and furnishings, constituted approximately fifty per cent of the total worth of the parties.

(c) Finally, the Court looks to the period of almost three months that expired between the date of filing the divorce and the date of executing the property settlement agreement as evidence that there was no fraudulent intent on the part of the Plaintiff. The Defendant was given ample time to seek counsel and did in fact confer with her brother and adult son prior to executing the agreement. There is no evidence that there was any coercion by the Plaintiff to hurry the Defendant into an agreement without ample opportunity to reflect on what she was doing.

IT IS THEREFORE THE ORDER, JUDGMENT AND DECREE OF THE COURT that the Motion to Vacate Judgment is denied.

Dated this 21st day of July, 1980.

(s) *Charles H. Headrick*  
ASSOCIATE DISTRICT JUDGE

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## APPENDIX B

[Filed August 19, 1980]

### IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CATHERINE H. MOORE,	)	
Appellant,	)	
v.	)	No. 55677
	)	
HARRY A. MOORE,	)	
Appellee.	)	

### PETITION IN ERROR

COMES NOW Catherine H. Moore, Appellant now and Petitioner below, by and through her attorneys, McClelland, Collins, Bailey, Bailey & Manchester by William F. Collins, Jr., and for her Petition in Error alleges and states that:

A. This appeal is taken from the District Court of Payne County, State of Oklahoma.

B. The style and number assigned to the case before the trial court was:

Harry A. Moore, Plaintiff	)	
v.	)	No. JFD-74-228
Catherine H. Moore, Defendant.	)	

C. A brief description of the nature of the case and the decision appealed from is as follows:

Appellee and plaintiff below originally filed a Petition against his then wife for divorce. At the time suit was filed Appellant was a patient in a psychiatric ward of a hospital. No summons was issued in the original action, rather Appellant signed a pro se Entry of Appearance prepared by Appellee's attorney. A Property Settlement Agreement was

## [APPENDIX]

executed by the parties on September 27, 1974, and a default judgment taken against Appellant on October 9, 1974. At no time during the proceedings was Appellant represented by counsel. On March 31, 1976, she filed a Motion to Vacate Judgment and caused summons to be issued. Appellee made an Entry of Appearance. From the time of the filing of the said motion until trial, miscellaneous pleadings, motions, etc. were filed; moreover, an appeal was taken to this Honorable Court. Trial on the said motion was had on June 30 and July 1, 1980, and the Court continued the matter until July 21, 1980, when final judgment overruling the said motion was entered. Thereafter, a further hearing was held on August 18, 1980, on Appellant's Application to be Reimbursed for Cost of Suit, Setting Attorney's Fees and Directing Payment. The Trial Judge denied the said application. It is from the orders overruling Appellant's Motion to Vacate Judgment and denying her said application that she brings this appeal.

D. The decisions appealed from were rendered on July 21, 1980, and August 18, 1980.

E. Neither party has filed a Motion for New Trial, and neither has requested that the matter be reopened or reconsidered.

F. The precise points of law urged as error are:

1. The entry of the default judgment against Appellant in the divorce proceeding constituted a denial of due process of law as to Appellant.

2. The divorce proceeding was not commenced in accordance with the law of the State of Oklahoma and the default judgment is a nullity.

3. Abuse of discretion by the Trial Judge in the hearing on Appellant's Motion to Vacate Judgment.

4. Erroneous Findings of Fact and Conclusions of Law by the Trial Judge.

5. Erroneous rulings by the Trial Judge concerning the admissibility and exclusion of evidence at the trial.

6. Erroneous ruling after objection by Appellant that Appellee's attorney in the divorce proceeding was competent to testify, and that he did testify.

7. At all times material to the divorce proceeding Appellant was a person of unsound mind.

8. The Trial Judge failed to place the burden of proving full disclosure of his assets and fairness of the property settlement agreement upon Appellee after Appellant had proved that a fiduciary relationship existed between the parties.

G. Appellant prays that this Court set aside or reverse and remand the Trial Judge's Orders entered on the 21st day of July, 1980, and the 18th day of August, 1980.

H. The names and addresses of each party represented, are as follows:

1. William F. Collins, Jr.  
McClelland, Collins, Bailey, Bailey  
& Manchester  
600 Hightower Building  
Oklahoma City, OK 73102  
(405) 235-9371

**ATTORNEYS FOR APPELLANT**

2. Lynn R. Osborn  
118 West 7th Street, Box 786  
Stillwater, OK 74074  
**ATTORNEY FOR APPELLEE**

[APPENDIX]

McCLELLAND, COLLINS, BAILEY, BAILEY  
& MANCHESTER

By: (s) *William F. Collins, Jr.*  
600 Hightower Building  
Oklahoma City, OK 73102  
(405) 235-9371

ATTORNEYS FOR APPELLANT

[Certificate of Mailing and Filing omitted here]

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## APPENDIX C

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[Filed June 30, 1980]

IN THE DISTRICT COURT OF PAYNE COUNTY,  
STATE OF OKLAHOMA

HARRY A. MOORE,	)	
Plaintiff,	)	
vs.	)	No. JFD-74-228
	)	
CATHERINE H. MOORE,	)	
Defendant.	)	

### AMENDED MOTION TO VACATE JUDGMENT

COMES NOW, Catherine H. Moore, Petitioner and defendant in the above styled cause and amends her heretofore filed "Motion to Vacate Judgment" by adding thereto the following, to-wit:

Petitioner requests that the Decree of Divorce heretofore entered on the 9th day of October, 1974, in Case No. JFD-74-228 be vacated, set aside and held for naught for the reason said Decree is void in that Summons was not issued by the Clerk of the District Court in the said cause and this Petitioner never legally nor effectively waived the issuance of a Summons therein.

WHEREFORE, Petitioner prays that the said Decree be declared void and of no force and effect.

(s) P. M. Williams  
P. M. WILLIAMS, Esq.  
1001 Fidelity Plaza  
Oklahoma City, Oklahoma 73102  
(405) 272-0646

ATTORNEY FOR PETITIONER

[Certificate of Service omitted here]

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## APPENDIX D

[Filed November 25, 1981]

### IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CATHERINE H. MOORE,	)	
Appellant,	)	
v.	)	No. 55677
	)	
HARRY A. MOORE,	)	
Appellee.	)	

#### AMENDMENT TO PETITION IN ERROR

COMES NOW the Appellant, and pursuant to Rule 1.17 amends her Petition in Error in the following particulars, to-wit:

By deleting therefrom grammatical Paragraphs F. and G. and substituting therefor the following:

F. The precise points of law urged as error are:

(1) The Trial Court was without jurisdiction to render a Decree of Divorce because no action was commenced pursuant to 12 O.S.(1971) §151, and further

Without the issuance of summons or other process wherein the defendant is directed to answer a defendant has no duty to answer and the rendering of a default judgment against him is premature and a denial of due process in violation of the Constitutions of the United States and the State of Oklahoma.

(2) The Trial Court erred and abused its discretion when it concluded as a matter of law that the Appellant was not a person of unsound mind at the time of executing the Entry of Appearance, Property Settlement Agreement, or on the date the divorce was granted because the probative proof in this record and the law of Oklahoma fails to support such conclusions.

## [APPENDIX]

(3) The Trial Court erred and abused its discretion when it concluded as a matter of law that the Appellant was not a person of unsound mind at the time of executing the Entry of Appearance, Property Settlement Agreement, or on the date the divorce was granted because the probative proof in this record and the law of Oklahoma fails to support such conclusions.

(4) That the Trial Court erred and abused its discretion when it found as a matter of law that no fraud was practiced by Appellee upon Appellant in the procurement of the Property Settlement Agreement and divorce because the probative proof fails to support such a conclusion.

(5) That the Trial Court erred and abused its discretion in concluding that the Appellant was capable of managing her own affairs because the probative proof in the record fails to support such a conclusion.

(6) That the Trial Court erred and abused its discretion when it concluded that the Appellant received approximately fifty per cent of the total worth of the parties from the Property Settlement Agreement, because the probative proof in the record fails to support such a conclusion.

(7) That the Trial Court erred and abused its discretion when it found that the value of the W. R. Grace and Company stock held by Appellee had a fair market value of approximately two and one-half million dollars, because the probative proof in the record fails to support such a conclusion.

(8) That the Trial Court erred when it allowed the attorney for Appellee to testify as a witness in the cause after Appellant had invoked the attorney-client privilege and had objected to his giving testimony.

(9) That the Trial Court erred and abused its discretion in not finding that Appellee had materially breached the fiduciary duty owed by him to Appellant and as a con-

sequence thereof Appellant's Motion to Vacate Judgment should have been sustained.

(10) That the Trial Court erred and abused its discretion when it failed to find that the Trial Court on October 9, 1974, was not fully informed as to the assets and income of Appellee and was therefore unable to approve the purported Contract for Property Settlement and Alimony.

(11) That the Trial Court erred and abused its discretion when it failed to find that an equitable division of the jointly acquired property of the parties had not been had.

(12) That the Trial Court erred in failing to consider the comments made by Judge Leon York on April 16, 1976.

(13) That the Trial Court erred when it failed to place the burden of proving full disclosure of assets and good faith and fairness in all of his dealings with Appellant on the Appellee.

(14) That the Trial Court erred and abused its discretion when it failed to find that Appellee had not overcome the presumption against validity of the Contract for Property Settlement and Alimony because the probative proof in the record shows he violated his fiduciary duty to Appellant in several material ways.

(15) At all times material to the divorce proceeding Appellant was a person of unsound mind.

(16) Erroneous rulings by the Trial Judge concerning the admissibility and exclusion of evidence at trial.

(17) That the Trial Court erred when it denied Appellant's Application to be Reimbursed for Costs of Suit, Setting Attorney's Fees and Directing Payment.

G. Appellant prays that the judgments and orders of the Trial Court rendered on July 21, 1980, and August 18,

## [APPENDIX]

1980, be reversed, vacated and set aside, and that her Motion to Vacate Judgment and Application to be Reimbursed for Costs of Suit, Setting Attorney's Fees and Directing Payment be sustained, and further, but only in the event the Court determines that a divorce proceeding was commenced against her, that the matter be remanded for a new trial and for such other and further relief as may be appropriate under the circumstances, including additional attorney fees and costs of suit.

In all other particulars Appellant's original Petition in Error shall remain the same as filed.

McCLELLAND, COLLINS, BAILEY,  
BAILEY & MANCHESTER

-and-

P. M. WILLIAMS

BY: (s) *P. M. Williams*

P. M. WILLIAMS, Esq.

1001 Fidelity Plaza

Oklahoma City, OK 73102

(405) 272-0646

ATTORNEYS FOR APPELLANT

[Certificate of Service omitted here]

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# APPENDIX E

NOT FOR PUBLICATION

[Filed February 8, 1983]

THE COURT OF APPEALS, DIVISION 3,  
STATE OF OKLAHOMA

HARRY H. MOORE,	)	
Appellee,	)	
versus	)	Case Number 55,677
	)	
CATHERINE H. MOORE,	)	
Appellant.	)	

APPEAL FROM THE DISTRICT COURT IN PAYNE COUNTY, OKLA.  
HONORABLE CHARLES H. HEADRICK, JUDGE

A F F I R M E D

Lynn R. Osborn	
Stillwater, Oklahoma,	For Appellee,
P. M. Williams	
Oklahoma City, Oklahoma,	For Appellant.

Opinion by Charles M. Wilson, Presiding Judge:

Catherine H. Moore appeals the trial court's order denying her Motion to Vacate the October 9, 1974 Decree of Divorce and Journal Entry of Judgment obtained by her former husband, Harry A. Moore.

On July 7, 1974, Catherine interned herself into the alcoholic treatment ward of a local hospital. Two days later, Harry filed for divorce. Rather than serving Catherine with a summons in the hospital, Harry's attorney suggested preparing an Entry of Appearance for Catherine's signature. Catherine's brother and eldest son presented her the document. The Entry of Appearance, reserving thirty days for Catherine's further pleading or answer, was signed, witnessed and filed July 10, 1974. At her insistence, Catherine was released from the hospital July 13, 1974.

## [APPENDIX]

At Harry's direction, his lawyer prepared a property settlement dividing the couple's jointly acquired property and providing for alimony to be paid Catherine. Harry's net worth was independently appraised to be in excess of \$2,000,000. Catherine was to receive the house, valued at \$110,000, her jewelry, a new car, and her personal bank accounts. Additionally, she would receive \$1,000,000 in alimony, payable in monthly installments of \$5,000.

The settlement was signed by the parties September 27, 1974. Catherine neither consulted another attorney, nor directed Harry's attorney to file pleadings or an answer in her behalf. On September 30, Harry moved the court for a decree of divorce by default.

Catherine admitted she knew about the hearing on Harry's Motion for Default Judgment. She also admitted she appeared at the courthouse on the day of the hearing. Catherine left the courthouse before the hearing began. At the direction of the trial court, the attorney for both parties personally contacted Catherine. Catherine indicated she had nothing to present to the court. The Decree and Judgment were entered accordingly.

Catherine filed her Motion to Vacate on March 31, 1976, alleging the Decree and the property settlement were obtained through fraud and duress. Catherine then amended her Motion to allege that her Entry of Appearance did not waive the summons requirements of 12 O.S. 1981 §151. Since no summons was issued, Catherine argued the trial court lacked jurisdiction over the divorce action.

After a full hearing, the trial court denied Catherine's Motion on July 21, 1980. The court held that Catherine waived any objection to service by executing the Entry of Appearance. Further, the court held that Catherine was not a person of unsound mind at the time she executed the Entry. Finally, the court found no fraud in Harry's procurement of the divorce and property settlement. Catherine filed this appeal.

Catherine's voluntary general appearance in the divorce action was equivalent to service of process. 12 O.S. 1981 §162; *Wagoner v. Saunier*, 627 P.2d 428 (1981). Moreover, her appearance, made without challenge to the court's jurisdiction, constituted a waiver of jurisdictional defects. *Russell v. McGinn*, 514 P.2d 658 (1973); *Gray v. Gray*, 459 P.2d 181 (1969). No reversible error resulted from Harry's failure to direct the issuance of a summons.

Ancillary to this procedural argument, Catherine asserts she was of unsound mind at the time she signed the Entry of Appearance. Catherine postulates that an alcoholic is a person of unsound mind wholly incapable of entering into binding agreements.

A person's ability to conduct business or manage personal affairs is a question of fact. See, *Tindel v. Williams*, 103 P.2d 551 (1940); *Oklahoma Natural Gas Corp. v. Lay*, 51 P.2d 580 (1935); 9 A.L.R.3d 15, 26. In this case, testimony was offered evaluating Catherine's mental and physical condition. Catherine also testified concerning her understanding of the divorce proceedings. The trial court's finding of fact that Catherine was not of unsound mind at the time of the divorce proceedings is supported by the evidence and will not be disturbed on appeal. See, *In Re DeVine's Estate*, 109 P.2d 1078 (1941).

Catherine's remaining arguments concern alleged inequities in the valuation and division of the couple's property. The record reflects that the trial court was fully apprised of Harry's assets and the method by which the assets were valued. Catherine asserts that the assets were worth far more than the 1974 appraisal stated. Findings of fact concerning the net worth and income of the parties will not be disturbed on appeal unless they are against the clear weight of the evidence. *Zink v. Zink*, 390 P.2d 504 (1964). On Catherine's Motion to Vacate, the trial court was presented with a voluminous record of Harry's income and business ventures. The court concluded that the stocks were



## [APPENDIX]

worth approximately \$2.5 million. The \$1,000,000 in alimony, coupled with the other real and personal property awarded Catherine "constituted approximately fifty percent of the total worth of the parties." Reviewing the record as a whole, the property settlement is neither inequitable nor clearly against the weight of the evidence. Accordingly, the trial court's order denying Catherine's Motion to Vacate the settlement must be affirmed. *DuBoise v. DuBoise*, 418 P.2d 924 (1966).

Similarly, we agree with the trial court's conclusion that the facts failed to establish any actionable fraud or overreaching perpetrated by Harry. Catherine admitted she understood Harry's settlement proposal. More than two months elapsed between the filing of the divorce and the signing of the settlement. While Harry did suggest that Catherine use his attorney to avoid a child custody dispute, it does not appear that Harry otherwise dissuaded Catherine from seeking independent counsel. Under these circumstances, the trial court's order was not clearly against the weight of the evidence or contrary to law. *Vetter v. Vetter*, 267 P.2d 606 (1954).

Finally, Catherine argues the trial court erred in denying her application for attorney's fees. Applications for attorney's fees accrued in actions subsequent to a divorce proceeding are addressed to the sound discretion of the trial court. Absent an abuse of discretion by the trial court, its decision on the application will stand. *Jones v. Jones*, 402 P.2d 272 (1965).

Under the particular facts and circumstances of this case, we find no abuse of discretion in the trial court's denial of Catherine's application.

Accordingly, the trial court's order is **AFFIRMED**.

HOWARD, J. and HUNTER, J. concur.

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## APPENDIX F

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### IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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CATHERINE H. MOORE,	)	
Appellant,	)	
v.	)	No. 55677
	)	
HARRY A. MOORE,	)	
Appellee.	)	

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APPEAL FROM THE DISTRICT COURT OF PAYNE COUNTY, OKLA.  
CASE No. JFD-74-228  
HONORABLE CHARLES H. HEADRICK, ASSOCIATE DISTRICT JUDGE

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#### APPELLANT'S NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Comes now Appellant and gives Notice of Appeal from the decision of the Supreme Court of the State of Oklahoma, it being the highest Court of the State of Oklahoma in which a decision could be had, to the Supreme Court of the United States pursuant to Title 28, United States Code, Section 1257 (1), (2) and (3).

Respectfully submitted:

Catherine H. Moore, Appellant

By: (s) *P. M. Williams*

P. M. WILLIAMS

Attorney for Appellant

525 Fidelity Plaza

Oklahoma City, Oklahoma

(405) 272-0646

[Certificate of Service omitted here]

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## APPENDIX G

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[Filed February 25, 1983]

THE COURT OF APPEALS, DIVISION 3,  
STATE OF OKLAHOMA

---

CATHERINE H. MOORE, APPELLANT

vs.

HARRY A. MOORE, APPELLEE

---

APPEAL FROM THE DISTRICT COURT OF PAYNE COUNTY, OKLA.  
CASE No. JFD-74-228

HONORABLE CHARLES H. HEADRICK, ASSOCIATE DISTRICT JUDGE

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### APPELLANT'S PETITION FOR REHEARING

Comes now Catherine H. Moore, Appellant ("Catherine"), and respectfully represents to the court that on the 8th day of February, 1983, an opinion and judgment was rendered by this court in this cause affirming the decision and judgment of the trial court which had denied Catherine's Motion to Vacate Judgment. It is respectfully submitted that this court erred in failing [sic] find as follows:

1. That the default judgment entered against Catherine was a denial of due process of law as to her.
2. That the divorce proceeding was not commenced in accordance with the law of the State of Oklahoma and the default judgment therefore is a nullity.
3. That the trial court had abused its discretion and erred regarding the inclusion and exclusion of certain evidence at the time of trial, and in its allowing Appellee's attorney to testify over Catherine's objection which was based upon the Attorney-client privilege.

## [APPENDIX]

4. That Catherine was a person of unsound mind on July 10, 1974, and continued to be so through October 9, 1974.
5. That the trial court failed to place the burden of proving full disclosure of assets and fairness of the property settlement agreement upon Appellee.

And further, Catherine respectfully would show the court that in the body of the Opinion the court has erred in several decisive particulars, and specifically in finding that she "interned herself"; and that "Harry's net worth was independently appraised"; and that she was awarded "her personal bank account"; and that she "indicated she had nothing to present"; and that "the record reflects that the trial court was fully apprised of Harry's assets and the method by which the assets were valued"; and that "The \$1,000,000 in alimony, coupled with the other real and personal property awarded Catherine "constituted approximately fifty percent of the total worth of the parties,"; and that the "facts failed to establish any actionable fraud or overreaching perpetrated by Harry"; and that she "understood Harry's settlement proposal"; and that "while Harry did suggest that Catherine use his attorney to avoid a child custody dispute, it does not appear that Harry otherwise dissuaded Catherine from seeking independent counsel"; and that "Under the particular facts and circumstances of this case, we find no abuse of discretion in the trial court's denial of Catherine's application.

And further, this court's decision is in conflict with the decision rendered by the Supreme Court of the State of Oklahoma on the 11th day of January, 1983, in *Carpenter v. Carpenter*, No. 56314, when this court affirmed the trial court's finding that "[but] more importantly, because of the tax basis in the stock, the actual value to the plaintiff was approximately \$2.5 million, and that that figure constituted the majority of the marital estate."

Wherefore Appellant prays that a rehearing of her Petition in Error may be granted by your Honorable Court for the reasons above stated. She supports the allegations made herein through her Brief in Chief, her Reply Brief and her Brief in Support of Petition for Rehearing.

Respectfully submitted,

Catherine H. Moore, Appellant

By:

(s) *P. M. Williams*

P. M. WILLIAMS, ATTORNEY FOR APPELLANT

1001 Fidelity Plaza

Oklahoma City, Okla. 73102

and

McCLELLAND, COLLINS, BAILEY, BAILEY AND  
MANCHESTER, ATTORNEYS, By

WILLIAM F. COLLINS, JR.

600 Hightower Bldg.

Oklahoma City, Okla. 73102

[Certificate of Service omitted here]

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